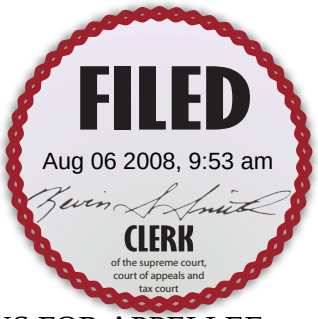

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IN THE
COURT OF APPEALS OF INDIANA

JASON GABOIAN,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 45A03-0712-CR-560
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Salvador Vasquez, Judge
Cause No. 45G01-0703-MR-3

August 6, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Jason Richard Gaboian appeals his conviction for felony murder.[1]

We affirm.

ISSUE

Whether the trial court erred in admitting evidence.

FACTS

In March of 2007, Ashley Lawrence, Gaboian's girlfriend, worked at a club in Gary; Gaboian often visited the club while Lawrence was working. Deshun Bennett also frequented the club.

During the evening of March 26, 2007, Gaboian telephoned Bennett and invited him to his apartment, located in the Cressmoor Park apartment complex in Hobart. Bennett went to Gaboian's apartment, where he, Gaboian and Lawrence had a "few beers" and talked. (Tr. 1075). Bennett then left, saying he was "going to bring some girls over and that he'd be right back." (Tr. 1075).

A little after midnight on March 27, 2007, Bennett went to the home of Heather Walker, who worked with Lawrence at the Gary club. Walker noticed that Bennett was carrying a handgun. Bennett had a permit to carry a .40 caliber handgun. Bennett left Walker's home at approximately 3:00 a.m., and driving his mother's maroon Dodge, returned to Gaboian's apartment. Bennett asked Gaboian whether he could spend the night at Gaboian's apartment "because he had drank [sic] too much." (Tr. 1076). Walker

[1] Ind. Code § 35-42-1-1.

spoke with Bennett at approximately 4:30 a.m., when Bennett telephoned Walker on his cell phone.

Adam Paradise, a resident of, and maintenance worker for, the Cressmoor Park apartment complex, left his apartment at approximately 7:30 a.m. on March 27, 2007, to start work, which included picking up trash from the complex's grounds and parking lot. Paradise did not notice any unusual marks in the grass. At approximately 12:20 p.m., as Paradise was walking through the complex, he noticed tire tracks in the grass leading to the back patio of apartment 3B, where Gaboian resided. The tire tracks then led from apartment 3B "around the building and out to the street." (Tr. 188).

At around noon on March 27, 2007, TiNita Harris was watching television in a second-floor bedroom of her Gary home. When Harris heard her dog barking, she looked out her window and observed a "red mini pickup truck . . . pointed westbound in the alley directly behind [her] house." (Tr. 96). Harris saw "a white guy get out of the driver's side of the truck." (Tr. 97). The man was smoking a cigarette and wearing "blue jeans and . . . a white t-shirt with the sleeves rolled up and a baseball cap." (Tr. 97). Harris noticed a second person sitting in the passenger's seat of the truck but could not identify the gender of that person.

Harris continued watching the man and observed him walk "to the back part of the truck and lift[] the little hatch thing down and . . . t[ake] a blanket and thr[o]w it back," as "he was pulling something off the back of the truck." (Tr. 98). The blanket was white with multi-colored flowers printed on it. As the man continued to pull the object from the bed of the truck, Harris realized that it was a body. Harris telephoned 911 and gave a

description of the truck, including a white decal "in the center of the back rear window of the truck." (Tr. 101).

Harris continued watching as the man pulled the body by its feet. After the man got the body out of the truck, "[h]e tossed it into the field that's next door to [Harris'] house." (Tr. 102). The man then placed two mattresses, which were already in the vacant lot, on top of the body.

The man started to back up the truck but then stopped and exited the truck, took the blanket from the bed of the truck and placed the blanket inside the truck's cab. Harris observed the man drive north on Tyler Street and then east onto Harrison Street, at which point Harris lost sight of the truck.

Gary Police Officer Michael George arrived at the vacant lot shortly after Harris' telephone call to 911. After speaking with Harris, Officer George lifted up the mattresses and "saw a male black laying [sic] on his back with what appeared to be a gunshot wound to his forehead." (Tr. 121). After securing the scene, Officer George discovered a butcher knife in the alley east of the vacant lot. Alan Magurany, a deputy and evidence technician with the Crime Laboratory Division of the Lake County Sheriff's Department (the "Crime Lab"), collected the knife found at the scene and took swabs from the knife to test for blood. Later that evening, Gary police officers drove Harris to the Cressmoor Park apartment complex, where Harris identified the truck she had seen earlier in the day. The truck belonged to Gaboian.

Around 11:00 a.m. on March 27, 2007, Gaboian arrived at the home of Jerry Novetske, who was dating Gaboian's mother. Gaboian "was all nervous and pacing

around, very anxious and said he had hurt himself in a fight." (Tr. 687). Gaboian asked Novetske "for one of [his] prescription pills." (Tr. 687). Novetske, however, refused to give Gaboian any medicine. As Gaboian was leaving Novetske's residence, Gaboian told him that "[s]ome nigger drug dealer pulled a gun . . . and threatened to kill [Gaboian] and [his] girlfriend." (Tr. 692). He also told him that he had killed this individual. (Tr. 690-91).

Later that day, at approximately 1:45 p.m., Lawrence purchased "two cans of 409 carpet cleaner and a mop" from a Lake Station Family Dollar store. (Tr. 706). At approximately 2:15 p.m., as Paradise was taking a break at the complex's maintenance garage, he observed Gaboian park "a red pickup truck" nearby. (Tr. 191). Paradise saw Gaboian exit the truck out of the driver's side and Lawrence exit out of the passenger's side. Gaboian then took a laundry basket from the bed of the truck. Paradise noticed that Gaboian was carrying the basket "way up high like, . . . just his arms were stiff . . . ." (Tr. 196). Paradise then observed Gaboian and Lawrence walk into their apartment building.

At approximately 3:30 p.m. on March 27, 2007, Mark Bogart, Gaboian's cousin, received a telephone call from Gaboian. Gaboian sounded upset, "like almost crying." (Tr. 625). Gaboian asked Bogart to come to his apartment. Bogart arrived at Gaboian's apartment between approximately 4:00 p.m. and 4:15 p.m.. When Bogart arrived at the front door, Gaboian "opened it and . . . pulled [Bogart] inside real quick by [his] arm," and told Bogart that "he had just killed someone that night." (Tr. 627). Gaboian then showed Bogart "blood stains on the carpet." (Tr. 627).

Gaboian told Bogart that he took the body "to the worst place in Gary he could find and like dropped it off there." (Tr. 629). Gaboian said that he and Lawrence took the body out of the apartment "[t]hrough the sliding glass doors," then "put the guy in the back of his truck and took him" to Gary. (Tr. 631). When Bogart asked why Gaboian had not telephoned the police, Gaboian said that Lawrence "had convinced him not to call the police." (Tr. 629). Gaboian then told Bogart that he and Lawrence disposed of Bennett's vehicle by taking "it to some chop shop . . . ." (Tr. 670). Bogart had seen Gaboian intoxicated many times; however, as Gaboian relayed what had happened, he did not appear or seem to be intoxicated.

Although Gaboian originally told Bogart that he had killed Bennett when he discovered Bennett raping Lawrence, Gaboian later told Bogart that Lawrence told him she had been raped by Bennett, gave Gaboian Bennett's gun and "told him that she wanted him to go out there and shoot him . . . ." (Tr. 660). When Gaboian told Bennett to leave, Lawrence "yelled for [Gaboian] to shoot" him, at which time Bennett "charged" Gaboian. (Tr. 660). Gaboian shot Bennett twice. When Bennett started "gargling," Gaboian then "slit his throat." (Tr. 660).

At some time between 4:30 p.m. and 5:00 p.m., Lawrence's sister, Amanda Lawrence, and Amanda's boyfriend, Troy Allen, arrived at Gaboian's apartment after failing to reach Lawrence on the telephone. As Amanda and Allen stood outside the front door of Gaboian's apartment, Amanda was speaking with Gaboian on the telephone. Allen, who owned a gun, heard what sounded like a clip being removed from the magazine of a gun and then a round being removed from a gun's chamber. When

Gaboian opened the apartment's front door to Amanda, she "could see that he was upset . . . . And he said . . . we had a bad night last night." (Tr. 541). Amanda asked what had happened, to which Gaboian replied "some nigger tried to rape your sister, so I blew his fucking head off." (Tr. 541). Gaboian then lifted up a tarp or blanket that had been covering the floor and couch. Amanda noticed "a red stain on the floor," just inside the apartment door. (Tr. 542). Allen noticed "that there was blood all over the place like blood all over the couch, blood all over the floor . . . ." (Tr. 562). Allen also "noticed the gun that was . . . by the kitchen counter." (Tr. 562).

Gaboian told Allen he "was defending" Lawrence and that "he rustled the gun away from the guy . . ." and "shot him in the head twice . . . . And then [Gaboian] grabbed a knife and started stabbing [Bennett] with a knife." (Tr. 566-67).

Gaboian indicated that Lawrence had wanted to telephone the police, but Gaboian wanted to speak with a lawyer first. Gaboian, however, believed that "he wouldn't get in trouble" if the body was never found. (Tr. 574). Gaboian informed Allen that the body "wouldn't be found because it was in the ghettoist [sic] of ghetto in Gary." (Tr. 573). Gaboian then asked Allen whether he could "get him anything to fuck him up," meaning "[a]ny pills, any weed . . . anything." (Tr. 567). Allen did not have or give any drugs to Gaboian.

Amanda then walked to the back bedroom, where she found Lawrence "curled up and . . . laying [sic] down facing away from [her]." (Tr. 543). Lawrence refused to leave with Amanda. Shortly thereafter, Amanda and Allen left the apartment.

At approximately 4:30 p.m. on March 27, 2007, James Gaboian, Gaboian's father, received a telephone call from Gaboian's sister, Gina. Gina informed him that Gaboian "had killed somebody." (Tr. 735). Initially, James could not make contact with Gaboian. Gaboian, however, telephoned James shortly thereafter. Gaboian "was crying uncontrollably, couldn't speak." (Tr. 743). Gaboian eventually told James that "someone was raping [Lawrence] . . . . When [Gaboian] came out [of the bedroom], this gentleman pulled a gun out from under the couch, put it in [Gaboian's] face, said [he was] going to kill both" Lawrence and Gaboian. (Tr. 744). Gaboian then said he managed to get the gun "and that's when it happened." (Tr. 744). Gaboian told James that he took Bennett "somewhere in Gary." (Tr. 746). Gaboian informed James that he was attempting to contact a lawyer.

Later that evening, at around 6:45 p.m., James again spoke with Gaboian on the telephone. Gaboian told James that he "just took some medicine to help [him] sleep," and that he "just want[ed] to lay [sic] down and go to sleep." (Tr. 751). Gaboian also indicated that there was a gun in the apartment, said goodbye, and "hung up on" James. (Tr. 752). James then telephoned the Hobart Police Department, identified himself, and gave them Gaboian's address, and "told them [he] ha[d] a reason to believe that there was a shooting at th[at] address." (Tr. 754). James also expressed concern that his son, Gaboian, "was committing suicide or possibility thereof . . . ." (Tr. 754). James also informed the Hobart Police Department "that there [wa]s a weapon still in the apartment . . . ." (Tr. 754).

At approximately 6:53 p.m., Hobart Police Officer David Burney received a dispatch to proceed to apartment 3B in the Cressmoor Park apartment complex. Officer Burney was "told by radio that there was a person who had called and had indicated that . . . his son was possibly overdosing and that he had a gun in the apartment and that he believes that he had shot someone." (Tr. 212). Once at the scene, Officer Burney and Officer David Beaham, who had arrived separately, "went down the hallway to the apartment . . . ." (Tr. 213). Officer Beaham knocked on the apartment's front door and announced "himself as Hobart Police Department." (Tr. 214). Shortly thereafter, Hobart Police Officer Monte White arrived at the scene.

Officer Beaham again knocked and announced his presence. At that point, Officer Burney exited the apartment building and went to the apartment's rear patio. Officer Burney found the sliding glass doors closed and the shades partially closed, but he could hear the knocking at the front door to the apartment. After a period of time, Officer Burney observed "a male figure coming from the back part of the apartment . . . approaching the door." (Tr. 216). Officer Burney then rejoined Officers Beaham and White at the apartment's front door.

When Gaboian opened the front door to his apartment, Officer Burney observed what appeared to be "red blood stains all up and down his pants." (Tr. 218). The officers inquired whether Gaboian "was all right," in response to which Gaboian "shook his head no and . . . pointed down to a red blood stain which [wa]s just inside the door . . . ." (Tr. 219). Officer Burney "saw just all the blood everywhere . . . ." (Tr. 219). Gaboian appeared "upset," "nervous," and looked like "he had been crying some . . . ." (Tr. 219).

When the officer again inquired whether Gaboian "was okay," he said, "'I shot him because he was raping my girlfriend, and I dumped his body in Gary." (Tr. 221). Gaboian then made "a motion for [the officers] to enter." (Tr. 248).

The officers then asked whether anyone else was in the apartment. Gaboian told them that Lawrence was in the apartment. After the officers had Gaboian exit the apartment, Officer Beaham called for Lawrence to come out of the bedroom and ordered her into the hallway.

Officers White, Beaham and Burney then entered the apartment "to make sure that there was no one hurt" and because "[t]here was also a chance that there could be some other offender in there." (Tr. 223). Officer Burney observed "blood . . . soaked into the carpet," and "a large blood stain on the couch itself." (Tr. 224). Officer Burney also observed a large "pile of fabric of some sort," with "blood all in and around that pile," on the floor. (Tr. 224). As Officer Burney cleared the apartment's bathroom, he noticed a pair of white sneakers, with what "appeared to be red blood stains all over both shoes," in the bathtub. (Tr. 225).

Prior to entering the apartment, Officer White also "observed what appeared to be red in color stains on the carpet . . . ." (Tr. 322). As Officer White searched the apartment "for the victim and any other potential people," (Tr. 328), he "observed a black in color handgun sitting on the counter top" in the kitchen. (Tr. 331). "Next to the handgun was a magazine." (Tr. 331). Officer White also saw "a pair of white sneakers that appeared to have red color stains on them" in the apartment's bathtub. (Tr. 332).

After verifying that no one else was in the apartment, the officers exited the apartment. The officers were in the apartment for approximately "[t]wo or three minutes." (Tr. 331).

Officer Burney then went back to the rear of the apartment, where he noticed tire tracks going from the patio area to the front of the building. Officer Burney also noticed "some cardboard boxes that had been laid flat," and he "could see red blots of blood . . . on the concrete around the apartment." (Tr. 227).

After Hobart Police Detective David Olson arrived at the scene, he observed a red pickup truck. The truck was "parked in front of the apartment complex . . . ." (Tr. 356). Shortly thereafter, at approximately 7:15 p.m., Detective Olson received information that an unidentified body had been discovered in Gary and that a witness had "observed a red pickup truck dump the body in Gary." (Tr. 791). An examination of the pickup truck at the scene revealed "a large amount of red stain" in the bed of the truck. (Tr. 792). Detective Olson believed it to be fresh blood as "it was still dripping." (Tr. 792). Detective Olson had the truck secured.

Later in the evening of March 27, 2007, Deputy Magurany responded to the Hobart Police Department's request for assistance at the Cressmoor Park apartment complex. Deputy Magurany observed that "[t]he scene was taped off with yellow barricade tape and . . . there w[ere] . . . tire tracks in the grass around the apartment." (Tr. 141). The tire tracks led up to the rear glass sliding doors of apartment 3B, a ground floor apartment. Deputy Magurany made a cast of the tire tracks.

Deputy Magurany subsequently went to the Hobart Police Department, where he photographed Gaboian and collected Gaboian's clothing. He also photographed Lawrence and collected her clothing.

Officer James Tomko, an evidence technician with the Crime Lab, arrived at the Cressmoor Park apartment complex at approximately 7:50 p.m. on March 27, 2007. Officer Tomko photographed Gaboian's truck and noted "unknown red stains," (Tr. 356), on the truck's rear bumper and in the bed of the truck, "towards the cab of the truck." (Tr. 357). Subsequently, Officer Tomko had the truck towed to the Crime Lab's garage. Officer Tomko also took photographs of "tire impressions or tire marks leading to around the back of the apartment building." (Tr. 358).

At approximately 9:30 p.m., Officer Tomko entered apartment 3B, where he noted and photographed a "can of 409" carpet cleaner. (Tr. 367). He took photographs of several items that appeared to be stained with the blood, including, but not limited to, the living room carpet, a couch, a multi-colored blanket, various clothing items, and the sliding glass door's frame. He also photographed a bullet hole in the living room wall and "retrieved a spent bullet from the hole . . . ." (Tr. 370). Additionally, he photographed and confiscated "a knife that was located in the garbage can with the handle bent at the blade." (Tr. 377). The knife's blade had "an unknown red stain" on it. (Tr. 377). He also collected "a spent cartridge casing located in the garbage can," as well as "a spent bullet and a live round at the bottom of the garbage can." (Tr. 378). The live round was from a .40 caliber gun.

Officer Tomko then photographed and collected "a semi-automatic .40 caliber" handgun and clip from the apartment's kitchen. (Tr. 381). He also swabbed the handgun. After he finished photographing and collecting evidence, he took the evidence to the Crime Lab for processing.

Officer Tomko returned to Gaboian's apartment early on the morning of March 28, 2007, to collect the plaster cast made from the tire marks in the grass. He then went to the Crime Lab's garage, where he "began to process the red pickup truck . . . ." (Tr. 417). There, he swabbed the truck's bed, rear bumper and various parts of the interior.

After transporting Lawrence and Gaboian to the police station and taking Lawrence's statement, Detectives Jeffrey White and Olson went to the home of Judge Longer, a Hobart City Court judge, "to get the search warrant signed." (Tr. 799). Judge Longer signed the search warrant at approximately 11:00 p.m. on March 27, 2007.

Three hours later, after Gaboian had been in police custody for approximately six hours, Detective Olson advised Gaboian of his *Miranda* rights. Gaboian signed a waiver-of-rights form and gave a tape-recorded statement.

Allen reported his encounter with Gaboian to his uncle, a reserve Hobart police officer, who in turn reported it to Hobart Police Officer Jeremy Ogden. At Detective White's request, Officer Ogden interviewed Allen and Amanda, both of whom reiterated the story told to them by Gaboian.

At approximately 7:15 p.m. on March 27, 2007, Ryan Shearer, a friend of Lawrence and Gaboian, arrived at his mother's residence in Lake Station, where he saw "a maroon Dodge Stratus parked in [his] mother's parking spot," behind the residence.

(Tr. 989). Shearer did not recognize the vehicle. After Shearer's mother arrived home at approximately 9:15 p.m., he realized that the vehicle did not belong to anyone they knew.

The early morning of March 28, 2007, Detectives Olson and White received information that Bennett's vehicle could be found at a residence in Lake Station. Detective White went to that residence and located the vehicle. Shearer informed Detective White that he knew Lawrence and that she had telephoned the residence earlier that day. The Caller ID on Shearer's telephone confirmed that a telephone call had been received from Lawrence's telephone. Detective White discovered Bennett's identification in the vehicle.

On March 30, 2007, Detective White obtained a second search warrant for Gaboian's apartment. At the request of the Hobart Police Department, Officer Tomko again went to Gaboian's apartment on April 9, 2007, where he collected two .40 caliber live rounds from one of the apartment's bedrooms. He also collected a yellow and black cell phone, which matched the description of the cell phone given to Bennett by his sister, and a .40 caliber live round from the apartment's master bedroom, as well as a spent cartridge casing from a garbage can located in the dining room. He also collected clothing, "a white plastic bag with Family Dollar on it," and "one Family Dollar receipt" from the apartment. (Tr. 436).

Officer Tomko submitted the following items to the Indiana State Police Laboratory for DNA analysis: the swab from the knife recovered in the Gary alley; a swatch from the couch in Gaboian's apartment; the knife discovered in the garbage can in Gaboian's apartment; a swab from the handgun discovered in Gaboian's apartment; the

shoes located in the bathroom of Gaboian's apartment; a swatch from an inflatable mattress found in Gaboian's apartment; and the jeans Gaboian was wearing on March 27, 2007. He also submitted the handgun, live ammunition and spent bullets to the firearms section of the Lake County Police Department for analysis.

Officer Juan Velazquez, a fingerprint examiner with the Crime Lab, retrieved a latent print from the gun magazine found in Gaboian's apartment, and "it was determined that the latent print came back with positive results to . . . Gaboian." (Tr. 957). Officer Jay Cruz, a firearms and tool mark examiner with the Crime Lab, examined the handgun found in Gaboian's apartment. He identified the handgun as "a Walther P99 .40 caliber semi-automatic pistol." (Tr. 961). Tests conducted revealed that the spent bullet lodged in the living room wall of Gaboian's apartment "was consistent with having been fired from" the Walther pistol discovered in Gaboian's apartment. (Tr. 976). Officer Cruz also determined that the magazine found in Gaboian's kitchen had been "worked through the action" of the Walther pistol by examining "the ejection marks" made on the magazine." (Tr. 972).

Dr. John Cavanaugh, a forensic pathologist with the Lake County Coroner's Office, performed the autopsy on Bennett. He observed that Bennett "had a gunshot wound of the forehead which went through his skull and brain and exited the back of the head," as well as "a gunshot wound of the back of the head which went forward and exited above the left ear." (Tr. 268). Dr. Cavanaugh also observed cuts on the face and "a busted . . . upper lip." (Tr. 269).

The gunshot wound to the forehead had "a contusion or bruise around the hole itself . . . that would be consistent with a[n] imprint . . . of the muzzle of the gun." (Tr. 269). There also was "gunshot residue at the entrance wound, implying, again, that this is a contact wound, that the gun, muzzle of the gun is right against the skin." (Tr. 269). The gunshot wound to the forehead "would have essentially rendered [Bennett] unable to go through any functions beyond basic life support" and alone would have caused Bennett's death. (Tr. 272). The gunshot wound to the back of Bennett's head also bore "signs of it being a contact wound." (Tr. 274). It also was capable of causing Bennett's death.

Dr. Cavanaugh also observed "close to 30-some stabs and cuts of the neck both in the front and to both sides[.]" (Tr. 277). He also documented scrapes "between the chest and abdomen," and on the buttocks, which appeared to have been caused after Bennett's death. (Tr. 280).

A toxicology test revealed that Bennett had a "fairly small" amount of a common tranquilizer in his system when he died. (Tr. 296). Bennett tested negative for alcohol.

On March 29, 2007, the State charged Gaboian with felony murder. On May 15, 2007, the State amended the charging information, charging Gaboian with Count 1, murder; and Count 2, murder while committing or attempting to commit robbery.

On July 2, 2007, Gaboian filed a motion to "suppress all evidence obtained from the execution of the facsimile search warrant at" Gaboian's apartment "on March 27, 2007[.]" (App. 42). Gaboian asserted that "[n]o exigent circumstances existed for the

request for a facsimile warrant," and that "[n]o recording exists of the proceedings in which the search warrant . . . was requested." (App. 42).

Also on July 2, 2007, Gaboian filed a second motion to "suppress his statements given to the police." (App. 44). Gaboian argued that he was under the influence of several drugs and alcohol when he made the statement, rendering it inadmissible.

The trial court held a hearing on Gaboian's motions to suppress on July 13, 2007.[2] On September 6, 2007, the trial court entered its order, denying Gaboian's motions to suppress.

A seven-day jury trial commenced on September 17, 2007. Gaboian made a continuing objection to the admission of evidence seized from Gaboian's apartment on March 27, 2007, and April 9, 2007.

During the trial, Gaboian stipulated that, to a reasonable degree of scientific certainty, Bennett was the source of DNA extracted from blood samples taken from the couch and air mattress located in his living room; the knife recovered from his kitchen; the shoes collected from his bathroom; the jeans worn by him on March 27, 2007; the knife retrieved from the Gary alley; and the driver's side seat, bed and rear bumper of his truck. The swab taken from the handgun in his apartment, however, "failed to demonstrate a DNA profile." (Tr. 904).

During the trial, Gaboian testified that Lawrence woke him, told him that Bennett had raped her, gave him cocaine to snort, which he did, gave him Bennett's gun, and told

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[2] Although Gaboian cites to the motion to suppress hearing in his FACTS section, he has not provided this court with a copy of the transcript.

him to shoot Bennett. He testified that he found Bennett sitting on the living room couch, "pulled the gun up on him," and told him to "get the fuck out of [his] house." (Tr. 1084). He testified that he repeated himself "two or three times," and Bennett replied, "whoa, whoa man, hold on. We could work it out . . . ." (Tr. 1084-85). He claimed that when Bennett denied raping Lawrence, Lawrence screamed to shoot him. He testified that Bennett then "sprang up off the couch to attack [him]," so he "shot him." (Tr. 1085). He testified that after firing the handgun, "when [he] seen [sic] [Bennett] starting to get up," he told Lawrence to get a knife. (Tr. 1088). Lawrence retrieved a knife for him and a knife for herself; he then stabbed Bennett before shooting Bennett a second time.

On September 25, 2007, the jury found Gaboian guilty of murder and not guilty of murder while committing or attempting to commit robbery. On October 19, 2007, the trial court sentenced Gaboian to fifty-three years in the Department of Correction.

Additional facts will be provided as necessary.

DECISION

Gaboian contends that the trial court erred with respect to two evidentiary issues.[3] Specifically, Gaboian asserts that the trial court improperly admitted all evidence seized from his apartment and improperly admitted his statement to the police.

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[3] We admonish and direct Gaboian's counsel to review Indiana Appellate Rule 46(A)(8)(a), which provides that "[e]ach contention must be supported by citations to . . . the Appendix or parts of the Record on Appeal . . . ." We also direct counsel to subsection (d) of Indiana Appellate Rule 46(A)(8), which provides that "[i]f the admissibility of evidence is in dispute, citation shall be made to the pages of the Transcript where the evidence was identified, offered, and received or rejected . . . ." We note that in his Argument, counsel fails to cite to any relevant portion of the record; thus, counsel leaves us to comb through a six-volume transcript. Generally, such failure results in a waiver of the argument for our review. *See Smith v. State*, 822 N.E.2d 193, 202-03 (Ind. Ct. App. 2005), *trans. denied*. Waiver

> We note that the admission or exclusion of evidence is within the sound discretion of the trial court, and we will reverse the trial court's determination only for an abuse of that discretion. An abuse of discretion occurs when a decision is clearly against the logic and effect of the facts and circumstances before the trial court. In reviewing the admissibility of evidence, we consider only the evidence in favor of the trial court's ruling and any unrefuted evidence in the appellant's favor. As a rule, errors in the admission or exclusion of evidence are to be disregarded as harmless unless they affect the substantial rights of a party. In determining whether an evidentiary ruling affected a party's substantial rights, we assess the probable impact of the evidence on the trier of fact.

Redding v. State, 844 N.E.2d 1067, 1069 (Ind. Ct. App. 2006) (citations omitted), *reh'g denied*.

1. Evidence Seized

Gaboian asserts that the trial court improperly admitted evidence seized from his apartment.[4] He contends that "[n]o exigent circumstances existed to justify the warrantless search of [Gaboian]'s apartment" when law enforcement initially arrived at the apartment on March 27, 2007, Gaboian's Br. at 11; "the Hobart police illegally re-entered [Gaboian]'s apartment without a search warrant" on March 28, 2007, Gaboian's Br. at 11; and because the "search warrant issued on March 30, 2007, was directly a result of the information obtained through the illegal searches of [Gaboian]'s apartment," the search conducted on April 9, 2007, also was illegal. Thus, Gaboian argues that the

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notwithstanding, and given the severity of the charges, we shall address Gaboian's arguments on the merits.

[4] Gaboian poses the issues as whether the trial court improperly denied his motion to suppress. *See* Gaboian's Br. at 7. Gaboian, however, did not seek an interlocutory appeal after the trial court denied his motion to suppress. Rather, he proceeded with his trial. "Once the matter proceeds to trial, the question of whether the trial court erred in denying a motion to suppress is no longer viable." *Kelley v. State*, 825 N.E.2d 420, 424 (Ind. Ct. App. 2005). The issue therefore becomes whether the trial court improperly admitted evidence at trial. *Id.* at 425.

seizure of evidence from his apartment violated the Fourth Amendment to the United States Constitution.[5]

The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Thus, the Fourth Amendment generally prohibits warrantless searches. *Frensemeier v. State*, 849 N.E.2d 157, 161 (Ind. Ct. App. 2006).

a. *Initial entry into Gaboian's apartment*

Gaboian argues that the responding officers conducted a search prohibited by the Fourth Amendment when they entered his apartment without a warrant. We disagree.

> [S]earches or seizures inside a home without a warrant are presumptively unreasonable. "However, 'on occasion the public interest demands greater flexibility than is offered by the constitutional mandate' of the warrant requirement." Accordingly, there are some carefully delineated exceptions to the warrant requirement. "A search without a warrant requires the State to prove an exception to the warrant requirement applicable at the time of the search."
>
> One exception allows police to dispense with the warrant requirement in the presence of exigent circumstances. "The warrant requirement becomes inapplicable where the 'exigencies of the situation' make the needs of law enforcement so compelling that the warrantless search is objectively reasonable under the Fourth Amendment." Among the well-known exigent circumstances that have justified a warrantless search or seizure are entries (1) to prevent bodily harm or death; (2) to aid a person in need of assistance; (3) to protect private property; and (4) to prevent actual or imminent destruction or removal of incriminating

[5] Gaboian does not raise any alleged violation of Article 1, Section 11 of the Indiana Constitution. Accordingly, we will review his challenges to the admission of evidence under only the Fourth Amendment.

> evidence before a search warrant may be obtained. Exigent circumstances have also been found where a suspect is fleeing or likely to take flight in order to avoid arrest; or the case involves hot pursuit or movable vehicles. In addition, we have found exigent circumstances where police entered to aid or prevent further injury to victims of violent crime.

McDermott v. State, 877 N.E.2d 467, 473-74 (Ind. Ct. App. 2007) (citations omitted). Furthermore, "[t]he Fourth Amendment does not cover observations made from vantage points accessed when the police enter private property to conduct an investigation or for another legitimate reason when the police restrict their movements to places where visitors would generally go, i.e., driveways, sidewalks, porches." *VanWinkle v. State*, 764 N.E.2d 258, 266 (Ind. Ct. App. 2002).

In this case, the officers were dispatched to Gaboian's apartment after his father reported that Gaboian may have attempted to commit suicide. His father also reported that there may have been a shooting at his son's residence and the possibility that weapons were still in the residence. Thus, the officers had reason to believe that someone was at risk of immediate danger or needed assistance when they went to Gaboian's apartment.

Furthermore, when the officers arrived at the apartment and Gaboian opened the door for them, the officers immediately observed that he had blood on himself and that there were large amounts of what appeared to be blood in the living room. He stated that his girlfriend had been raped and that he had shot the purported perpetrator. He also apparently made "a motion for [the officers] to enter" the apartment. (Tr. 248). Not knowing whether a victim remained in the apartment or whether there was "some other offender in there," the officers entered Gaboian's apartment. (Tr. 223).

It is clear from the record that exigent circumstances justified the immediate warrantless entry into Gaboian's apartment. Accordingly, we find that the officers did not violate the Fourth Amendment when they entered Gaboian's apartment without a warrant.[6]

b. *Search on April 9, 2007*

Gaboian also asserts that police officers entered his apartment without a warrant on March 28, 2007. Gaboian argues that the "warrantless search was unreasonable and illegal" and therefore invalidated the search warrant issued on March 30, 2007, thereby rendering the subsequent search on April 9, 2007, illegal. Gaboian's Br. at 11.

Specifically, Gaboian contends the following:

> [o]n March 28, 2007, the Hobart police returned to [Gaboian]'s apartment, and without permission of [Gaboian], entered the apartment. The police observed items in the apartment which the officers of the [Crime Lab] had not collected before the issuance of the written search warrant at midnight on March 27, 2007. Having viewed such items of evidentiary value, on

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[6] Gaboian fails to make a cogent argument or cite to authority that the subsequent search and seizure by officers and evidence technicians prior to Detectives White and Olson obtaining a search warrant the night of March 27, 2007, was illegal. Rather, Gaboian only asserts that "[t]he State has failed to carry its burden of demonstrating the lawfulness of the warrantless searches of [Gaboian]'s apartment on March 27, 2007." Gaboian's Br. at 11. Therefore, Gaboian has waived this argument. *See* Ind. Appellate Rule 46 (A)(8) ("Each contention must be supported by citations to the authorities, statutes, and the Appendix or parts of the Record on Appeal relied on . . ."); *Smith v. State*, 822 N.E.2d 193, 202-03 (Ind. Ct. App. 2005) (holding that a party waives an issue where the party fails to develop a cogent argument or provide adequate citation to authority and portions of the record), *trans. denied*. Nevertheless, we note that any alleged illegal search and seizure would fall under the Fourth Amendment's inevitable discovery exception to the exclusionary rule, which "'permits the introduction of evidence that eventually would have been located had there been no error, for that instance 'there is no nexus sufficient to provide a taint.'" *Shultz v. State*, 742 N.E.2d 961, 965 (Ind. Ct. App. 2001) (quoting *Banks v. State*, 681 N.E.2d 235, 239 (Ind. Ct. App. 1997) (quoting *Nix v. Williams*, 467 U.S. 431, 438 (1984)), *trans. denied*. Here, law enforcement officers could have obtained a search warrant based on information given to them by Gaboian, what they observed during their initial sweep of Gaboian's apartment, and information given to them by Gary police "and all the remaining evidence would have been inevitably and lawfully discovered in the execution of the search warrant." *Shultz*, 742 N.E.2d at 965. Accordingly, the admission of the evidence was proper under the Fourth Amendment.

> March 30, 2007, the Hobart police prepared another search warrant affidavit and obtained another search warrant for [Gaboian]'s apartment.

Gaboian's Br. at 9.

Gaboian fails to cite to any portion of the record supporting his contention that officers re-entered his apartment on March 28, 2007. A review of the trial transcript, however, reveals that Paradise testified that on March 28, 2007, he assisted officers in placing on Gaboian's apartment door "a hasp which is a lock mechanism to apply to the door to lock it up so nobody can get in." (Tr. 205). During the trial, Detective Olson denied that the search warrant obtained on March 30, 2007, was based on information allegedly gathered during a search of Gaboian's apartment on March 28, 2007.

Upon review of the record, we cannot say that the trial court abused its discretion in admitting evidence seized from Gaboian's apartment on April 9, 2007, pursuant to the search warrant issued on March 30, 2007.

2. Gaboian's Statement

Gaboian asserts that the trial court "committed reversible error in not suppressing the statement of [Gaboian] and admitting the statement into evidence over the objection of [Gaboian]." Gaboian's Br. at 12. Specifically, he argues that the "the State failed to carry its burden of demonstrating that [Gaboian] voluntarily gave a statement to police," Gaboian's Br. at 12-13, where

> [a]t the time that [Gaboian] made his statement to the Hobart Police, [Gaboian] was under the influence of alcohol and numerous drugs. . . . Further, it is clear that after [Gaboian] asked the police officer whether he had to give a statement, the police officer nodded his head.

Gaboian's Br. at 12.

> If a defendant challenges the voluntariness of a confession under the United States Constitution, the state must prove the statement was voluntarily given by a preponderance of the evidence. Thus, a federal constitutional claim that a confession was not voluntarily given is governed by a preponderance of the evidence standard. However, the Indiana Constitution requires the state to prove "beyond a reasonable doubt that the defendant voluntarily waived his rights, and that the defendant's confession was voluntarily given."

Pruitt v. State, 834 N.E.2d 90, 114-15 (Ind. 2005) (citations omitted), *cert. denied*, 548 U.S. 910 (2006). The "totality of circumstances" determines the voluntariness of a confession. *Washington v. State*, 808 N.E.2d 617, 622 (Ind. 2004). "In turn, the 'totality of the circumstances' test focuses on the entire interrogation, not on any single act by police or condition of the suspect." *Id.*

a. *Deception*

Gaboian maintains that his statement to police was not voluntary because Detective Olson deceived him into believing he had to give a statement. "[P]olice deception does not automatically render a confession inadmissible." *Miller v. State*, 770 N.E.2d 763, 775 n.5. Rather, police deception is one factor to consider in determining whether a confession was voluntarily given. *Id.*

Detective Olson testified to the following:[7]

> Q. During the statement, the recorded statement, you ask Mr. Gaboian if he is prepared to give a statement, and his response is something to the effect I have to, don't I? Do you recall that?
>
> A. Yes.

[7] Gaboian provides neither a tape recording nor transcript of his statement.

Q. And do you also recall nodding your head normally used for yes towards [Gaboian] when he asked you "I have to, don't I"?

A. I don't recall nodding my head.

Q. Okay. And you testified in a previous hearing concerning a similar issue, right?

A. Correct.

Q. And during that particular hearing, you acknowledged that you might have nodded your head?

A. Certainly I might have, but I don't recall if I actually did it or not.

* * *

Q. You nodded your head indicating to [Gaboian] that he had to answer, right?

A. I can't say right to that. . . . I may have. I don't know.

(Tr. 834-35).

Given the evidence, we cannot say that Detective Olson deceived Gaboian into giving a statement or that any alleged deception rendered Gaboian's confession involuntary, particularly where he had been fully advised of his *Miranda* rights, indicated that he understood his rights, "was a mature individual of normal intelligence," and was not interrogated for an inordinate amount of time. *See Pierce v. State*, 761 N.E.2d 821, 824 (Ind. 2002). Furthermore, we cannot say that Gaboian's question was an assertion of his Fifth Amendment right to remain silent, where he did not indicate his wish to remain silent, and he continued giving his statement.

b. *Intoxication*

Gaboian further maintains that he was unable to comprehend his constitutional rights when he gave his statement to police because he was under the influence of alcohol and drugs.

> In evaluating a claim that a statement was not given voluntarily, the trial court is to consider the totality of the circumstances, including: "the crucial element of police coercion, the length of the interrogation, its location, its continuity, the defendant's maturity, education, physical condition, and mental health." On appeal, we do not reweigh the evidence but instead "examine the record for substantial, probative evidence of voluntariness." We examine the evidence most favorable to the state, together with the reasonable inferences that can be drawn therefrom. If there is substantial evidence to support the trial court's conclusion, it will not be set aside.
>
> If voluntariness of a statement is challenged on the basis that the defendant was under the influence of drugs, the defendant has the burden to introduce evidence from which it could be concluded that the amount and nature of the drug consumed would produce an involuntary statement. The mere fact a statement is made by the defendant while under the influence of drugs, or that the defendant is mentally ill, does not render it inadmissible per se. Intoxication, drug use and mental illness are only factors to be considered by the trier of fact in determining whether a statement was voluntary.

Pruitt v. State, 834 N.E.2d at 115 (citations omitted). "The critical inquiry is whether the defendant's statements were induced by violence, threats, promises, or other improper influence." *Scalissi v. State*, 759 N.E.2d 618, 621 (Ind. 2001).

A confession is rendered inadmissible due to intoxication "only when an accused is so intoxicated that he is unaware of what he is saying . . . ." *Pruitt*, 834 N.E.2d at 115. "Intoxication of a lesser degree goes only to the weight to be given the statement and not its admissibility." *Id.*

Detective Olson testified that when he first encountered Gaboian outside of his apartment at approximately 7:15 p.m., he asked him whether he had consumed alcohol or

drugs, to which Gaboian "said no, he did not." (Tr. 786). Gaboian told Detective Olson that he "was all right," and he appeared to be all right. (Tr. 786). Detective Olson did not detect the odor of alcohol, and he was responsive to Detective Olson's questions.

According to Detective Olson, officers transported Gaboian to the Hobart Police Department at approximately 7:40 p.m. Paramedics examined Gaboian prior to being transported. Detective Olson advised Gaboian of his rights and took Gaboian's statement "right around 2:00 o'clock in the morning" of March 28, 2007. (Tr. 804). Thus, Gaboian had been in custody for more than six hours when he gave his statement.

Bogart testified that he had seen Gaboian intoxicated "[a]t least 50 times," and that he had seen Gaboian under the influence of drugs "[o]ver a hundred" times prior to March 27, 2007. (Tr. 638, 639). Bogart further testified that when he met with Gaboian around 4:15 p.m. or 4:30 p.m. on March 27, 2007, Gaboian did not appear to be intoxicated.

Viewing the evidence most favorable to the State, we cannot say Gaboian was in a state of intoxication that would render his confession inadmissible. Moreover, Gaboian presents no evidence of threats, violence, promises, or the use of improper influence by the police to obtain his statement. Accordingly, we find no abuse of discretion in admitting Gaboian's statement.[8]

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[8] Even if we were to find that the trial court erred in admitting evidence, we would find such error harmless. "Errors in the admission or exclusion of evidence are to be disregarded as harmless error unless they affect the substantial rights of the party." *Corbett v. State*, 764 N.E.2d 622, 628 (Ind. 2002). We "assess the probable impact of that evidence upon the jury" in determining whether the admission of evidence affected the party's substantial rights. *Id.* In this case, Gaboian told several people that he had killed Bennett. Harris identified Gaboian's truck as the one used to transport Bennett's body to Gary.

Affirmed.

NAJAM, J., and BROWN, J., concur.

DNA extracted from Gaboian's truck and clothes matched Bennett's DNA profile. Given the evidence, we cannot say that the probable impact of the admission of evidence obtained from Gaboian's apartment and his statement to police affected Gaboian's substantial rights. Therefore, any error in admitting the evidence must be disregarded as harmless.